

A **EKWE SAMPSON ODII v. PP**
COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
B [CRIMINAL APPEAL NO: B-05-269-09-2014]
11 JANUARY 2016

C **EVIDENCE:** Exhibits – Break in chain of evidence – Trafficking in dangerous drugs – Capsules containing drugs recovered from body of accused – Failure of prosecution to tender search list – Whether search list was corroborative in nature – Whether failure to produce fatal to prosecution case – Whether there was break in chain of evidence – Whether created doubt as to identity of exhibits

D **EVIDENCE:** Exhibits – Identity of exhibits – Capsules containing drugs recovered from body of accused – Whether drugs seized from accused and handed to chemist same with exhibits produced before court – Disparity in weight of drugs – Whether due to different weighing methods and weighing apparatus used by police and chemist – Whether exhibits properly handled – Whether there was break in chain of evidence – Whether created doubt as to identity of drugs exhibits

E **CRIMINAL LAW:** Dangerous Drugs 1952 – Section 39B(1)(a) – Trafficking in dangerous drugs – Defence – Drugs encapsulated and concealed in body – Defence of accused that he was told that capsules contained diamonds – Whether defence an afterthought – Whether accused had knowledge of what he was carrying

F The appellant, a Nigerian national, upon his arrival at the Kuala Lumpur International Airport, was stopped by Inspector Gan Chee Liang ('PW10'), who was on duty at the Immigration Counter. The search on the appellant and inside the bag carried by the appellant did not reveal anything incriminating. The appellant was subsequently taken to a hospital where the X-rays conducted on the appellant showed that he had ingested foreign
G bodies. An enema was administered on the appellant to hasten expulsion of the foreign bodies. A total of 61 capsules were excreted by the appellant. Search lists were prepared by PW4 and PW5 and were handed to the investigating officer ('IO'). PW4, PW5 and the IO also had signed the 'borang serah menyerah'. The exhibits were subsequently handed to the chemist ('PW1') who testified that she had received from the IO an envelope
H containing five plastic packets which contained 61 capsules. Upon analysis, it was found that the white crystal substance in the capsules contained 485.4g of methamphetamine. The appellant was thus charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. At trial, the search list prepared by PW5 and the borang serah menyerah were not produced as,
I according to the IO, the documents had gone missing. Nevertheless, the trial judge found no break in the chain of evidence such as to raise a doubt as to the identity of the drugs exhibits and the number of capsules recovered. The

trial judge found that the prosecution had proved a *prima facie* case against the appellant and therefore ordered the appellant to enter his defence. The appellant's defence was that he was forced to swallow the capsules before departing his country to Malaysia. The appellant contended that he was told that the capsules contained diamonds and when he resisted, he had been slashed on the back. He further stated that he had travelled with one 'Amiga' who had also swallowed the capsules. At the end of the trial, the trial judge found that the defence of the appellant was an afterthought and that Amiga was a fictitious character. The appellant was thus found guilty and convicted and sentenced to death. Hence, the appeal. The issues raised in the appeal were: (i) failure by the prosecution to produce the search list and the borang serah menyerah that was prepared by PW5 and handed over to PW11; (ii) discrepancies in the gross weight of the drugs as stated in the initial charge sheet and the weight and the gross weight obtained by the chemist; and (iii) discrepancies in the number of capsules retrieved by PW4 and PW5 and handed over to PW11 and the number of capsules received by PW1 for analysis.

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Held (dismissing appeal)**Per Aziah Ali JCA delivering the judgment of the court:**

- (1) The search list and the borang serah menyerah, though relevant, would have been in the nature of corroborative evidence on the number of capsules that PW5 said had been excreted by the appellant. Their absence was not fatal to the prosecution because there was ample evidence to support the testimony of PW5 and PW4 on the number of capsules they had recovered. (para 25)
- (2) All the drugs exhibits were produced and identified by the relevant witnesses. Based on the evidence adduced, the trial judge had not erred in finding that there was no doubt that the drugs exhibits seized by both PW4 and PW5 and handed over to PW11 and examined by PW1 were the same drug exhibits produced before the court. The drug exhibits had been properly handled and there was no break in the chain of evidence regarding the handling of the exhibits that could have created a reasonable doubt as to the identity of the drug exhibits. Furthermore, in his defence, the appellant had confirmed that he had swallowed the said 61 capsules. (para 27)
- (3) The weighing done by the chemist is the determining factor in the weight of the drugs and forms the basis of the charge, rather than the weighing process by the police. The weighing process by the police is only for classification purpose in the determination of the charge that will most likely to be preferred against the accused and/or arrested person. More often than not, the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police force and the chemist department. Hence,

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- A there was no merit in the issue pertaining to the discrepancies in the gross weight of the drugs stated in the initial charge sheet and the weight and gross weight obtained by the chemist. (para 28)
- (4) The appellant did not mention anything about Amiga or his injuries to PW10 at the first available and best opportunity *ie*, when he was stopped and searched by PW10 at the airport. Neither was PW10 cross-examined as to whether he had found any injuries on the appellant when he conducted a body search on the appellant. Hence, the character of 'Amiga' was fictitious. The calm demeanour of the appellant during the search could be attributed to the fact that he had drugs concealed inside his body and not on his person or in his luggage. Therefore, there was no reason for him to be apprehensive about a body search. (para 30)
- (5) If the appellant's contention, that he was told that the capsules he swallowed contained diamonds, was true, it was inconceivable that he was not told what he was supposed to do with them once he is in Malaysia. It was also implausible that the people who had purportedly forced him to swallow the precious diamonds would have allowed him to carry them all the way from Africa to Malaysia without telling him precisely what he had to do with the diamonds. In the circumstances, the defence was an afterthought. The manner in which the drugs were concealed and the method employed to carry the drugs to Malaysia showed that the appellant knew what he was carrying. (paras 29 & 31)

Bahasa Malaysia Headnotes

- Perayu, seorang warganegara Nigeria, setibanya di Lapangan Terbang Antarabangsa Kuala Lumpur, telah ditahan oleh Inspektor Gan Chee Liang ('PW10') yang bertugas di Kaunter Imigresen. Pemeriksaan pada perayu dan di dalam beg yang dibawanya tidak mendedahkan apa-apa barang salah. Perayu kemudiannya dibawa ke hospital di mana imbasan X-ray atas perayu menunjukkan bahawa dia ada menelan benda asing. Anema diberi kepada perayu untuk menyegerakan penyingkiran benda asing. Sejumlah 61 kapsul telah dikeluarkan dari dubur perayu. Senarai carian disediakan oleh PW4 dan PW5 dan diserahkan kepada pegawai penyiasat ('PP'). PW4, PW5 dan PP juga menandatangani borang serah menyerah. Ekshibit tersebut kemudian diserahkan kepada ahli kimia ('PW1') yang memberi keterangan bahawa dia menerima daripada PP sampul surat berisi lima paket plastik yang mengandungi 61 kapsul. Setelah analisis, didapati bahawa bahan kristal putih dalam kapsul mengandungi 485.4g methamphetamine. Perayu dengan itu didakwa atas kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Dalam perbicaraan, senarai carian yang disediakan oleh PW5 dan borang serah menyerah tidak dikemukakan kerana, menurut PP, dokumen tersebut hilang. Walau bagaimanapun hakim bicara mendapati tiada lompang dalam rangkaian keterangan yang menimbulkan keraguan tentang identiti ekshibit dadah dan bilangan kapsul dijumpai. Hakim bicara mendapati bahawa pihak

pendakwaan berjaya membuktikan kes *prima facie* terhadap perayu dan dengan itu mengarahkan perayu membela diri. Pembelaan perayu adalah dia dipaksa menelan kapsul tersebut sebelum berlepas dari negaranya ke Malaysia. Perayu menghujahkan yang dia diberitahu bahawa kapsul tersebut mengandungi berlian dan apabila dia melawan dia ditetak di bahagian belakang. Dia menyatakan bahawa dia datang dengan seorang bernama 'Amiga' yang turut menelan kapsul tersebut. Di akhir perbicaraan, hakim bicara mendapati bahawa pembelaan perayu adalah satu fikiran terkemudian dan Amiga merupakan satu watak rekaan. Perayu didapati bersalah dan disabitkan kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang berbangkit dalam rayuan adalah: (i) kegagalan pihak pendakwaan mengemukakan senarai carian dan borang serah menyerah yang disediakan oleh PW5 dan diserahkan kepada PW11; (ii) percanggahan dalam berat kasar dadah seperti yang dinyatakan dalam kertas pertuduhan awalan dan berat kasar yang diperolehi oleh ahli kimia; dan (iii) percanggahan dalam jumlah kapsul yang diambil oleh PW4 dan PW5 dan diserahkan kepada PW11 dan bilangan kapsul yang diterima oleh PW1 untuk analisis.

Diputuskan (menolak rayuan)

Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

- (1) Senarai carian dan borang serah menyerah, walaupun relevan, bersifat keterangan sokongan mengenai bilangan kapsul yang dikatakan PW5 dikeluarkan oleh perayu. Ketidadaannya tidak memudaratkan pihak pendakwaan kerana terdapat banyak bukti menyokong keterangan PW5 dan PW4 tentang bilangan kapsul yang dijumpai.
- (2) Kesemua ekshibit dadah dihasilkan dan dikenal pasti oleh saksi-saksi relevan. Berdasarkan keterangan yang dikemukakan, hakim bicara tidak khilaf dalam dapatannya bahawa tiada apa-apa keraguan bahawa ekshibit dadah yang dirampas oleh PW4 dan PW5 dan diserahkan kepada PW11 dan diperiksa oleh PW1 adalah ekshibit dadah sama yang dikemukakan di mahkamah. Ekshibit dadah dikendalikan dengan betul dan tiada kelompangan rantaian keterangan berkenaan pengendalian ekshibit yang boleh mewujudkan keraguan munasabah tentang identiti ekshibit dadah. Tambahan lagi dalam pembelaannya, perayu mengesahkan bahawa dia telah menelan 61 kapsul tersebut.
- (3) Timbangan oleh ahli kimia adalah faktor penentu berat dadah dan menjadi asas pertuduhan dan bukannya proses timbangan oleh pihak polis. Proses timbangan pihak polis hanya untuk tujuan klasifikasi dalam menentukan pertuduhan yang harus dikenakan terhadap tertuduh dan/atau orang yang ditahan. Selalunya perbezaan pada berat dadah yang direkodkan tidak dapat dielakkan kerana perbezaan kaedah timbangan dan alat timbangan yang digunakan oleh pihak polis dan jabatan kimia.

- A Justeru, tiada merit dalam isu berkaitan dengan percanggahan berat kasar dadah yang dinyatakan dalam kertas pertuduhan awalan dan berat dan berat kasar yang diperolehi oleh ahli kimia.
- (4) Perayu tidak menyatakan apa-apa mengenai Amiga atau kecederaannya kepada PW10 semasa timbul peluang terawal dan terbaik iaitu apabila B dia ditahan dan diperiksa oleh PW10 di lapangan terbang. PW10 juga tidak disoal siasat sama ada dia menemui sebarang kecederaan pada perayu apabila dia menjalankan pemeriksaan badan perayu. Maka, watak 'Amiga' adalah palsu. Perilaku perayu yang tenang semasa carian boleh dikaitkan dengan hakikat bahawa dia mempunyai dadah yang C tersembunyi di dalam badannya dan tidak pada dirinya atau di dalam bagasinya. Oleh itu, tiada alasan untuk dia bimbang terhadap pemeriksaan badan.
- (5) Jika hujahan perayu yang dia diberitahu bahawa kapsul yang ditelan D mengandungi berlian adalah benar, mustahil jika dia tidak diberitahu apa yang sepatutnya dilakukan sebaik sahaja dia tiba di Malaysia. Juga mustahil bahawa orang yang kononnya memaksanya menelan berlian berharga membenarkan dia membawanya dari Afrika ke Malaysia tanpa memberitahunya dengan terperinci apa yang perlu dilakukan dengan E berlian tersebut. Dalam keadaan ini, pembelaannya satu fikiran terkemudian. Cara di mana dadah itu disembunyikan dan kaedah yang digunakan untuk membawa dadah ke Malaysia menunjukkan bahawa perayu tahu apa yang dibawanya.

Case(s) referred to:

Hasbala Mohd Sarong v. PP [2013] 6 CLJ 945 FC (refd)

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Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 39B(1)(a)

For the appellant - Muhammad Fadhli Mat Sutris; M/s Fadhli Sutris & Badrul Munir

For the respondent - Muhamad Yasser Mohd Nasri; DPP

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[Appeal from High Court, Shah Alam; Criminal Trial No: 45A-128-06-2012 (affirmed).]

Reported by S Barathi

JUDGMENT

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Aziah Ali JCA:**Introduction**

[1] The appellant was charged with an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) as follows:

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Bahawa kamu bermula dari 15.1.2012 jam lebih kurang 3.15 petang sehingga 16.1.2012 jam lebih kurang 11.00 malam di kawasan selepas Kaunter Imigrasi No. 53, Aras 3, Bangunan MTB KLIA, dan Bilik 28,

Wad 6C, Hospital Serdang di dalam Daerah Sepang, dalam Negeri Selangor, kamu telah mengedar dadah berbahaya sejumlah 485.4 gram Methamphetamine dan oleh demikian kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum dibawah seksyen 39B(2) Akta yang sama.

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[2] At the conclusion of the defence case, the trial judge found that the defence is a mere denial and an afterthought and that the defence had failed to raise a reasonable doubt in the prosecution's case. The appellant was convicted and sentenced to death, hence this appeal. We had heard the appeal and having considered the appeal records and the submissions made before us by learned counsel for the appellant and the learned Deputy Public Prosecutor (DPP) on the issues raised, we found no merit in the appeal. The appeal was consequently dismissed and we affirmed the conviction and sentence imposed by the court below. We now give our reasons below.

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Case For The Prosecution

[3] On 15 January 2012, Inspector Gan Chee Liang (PW10) together with D/Cpl Mohamad Ali bin Said (DW2) and Det L/Cpl Mohamad Nasrul Faiz bin Mohd Jusoh (DW3) were on duty at the Immigration Counter No. 53 at the International Arrival Hall, Kuala Lumpur International Airport (KLIA). At about 3.15pm, PW10 stopped the appellant who was alone. The appellant was carrying a bag (exh. P24). PW10 identified himself as a police officer and he directed his men to take the appellant to the narcotics office at KLIA. According to PW10, the appellant was calm and did not resist.

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[4] PW10 conducted a search on the appellant but nothing incriminating was found. Similarly nothing incriminating was found inside the bag carried by the appellant. PW10 prepared a search list (exh. P29). The appellant's passport (exh. P30) showed that he is a Nigerian national. A boarding pass with the appellant's name was also recovered (exh. P36). PW10 then decided to take the appellant to the Serdang Hospital. He lodged a police report (exh. P28).

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[5] PW10 together with DW2 then accompanied the appellant to the hospital. At the hospital, two x-rays were taken on the appellant, one at the chest and another at the abdomen (exhs. P13A & P13B), by Aminah bt Draman (PW3). Dr Ramesh (PW6) was notified that the x-rays conducted on the appellant showed that he had ingested foreign objects. The appellant was then admitted to Ward 6C, room 28. An enema was administered on the appellant to hasten expulsion of the foreign objects and clear the bowel.

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[6] The investigating officer (I.O.) Inspector Haryati binti Zahrudin (PW11) arrived at the hospital at about 7pm. She instructed D/Cpl S Pannir Chelvam a/l Suppramaniam (PW5) and D/Cpl Mohd Sazman bin Abdullah (PW4) to act as sentries in room 28. Present with PW4 and PW5 was the police photographer D/Cpl Suhaime bin Osman (PW2), who was instructed by the I.O. to take photographs of the events that transpired in room 28.

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- A [7] The evidence of PW5 was as follows:
- (a) at 6.30pm, PW5 saw the appellant excreted 35 yellow-coloured capsules;
 - B (b) PW5 directed the appellant to clean the capsules and to put the capsules on the sink in the room for PW2 to take photographs (exh. P11(7), (15) and (16));
 - (c) the appellant then handed the capsules to PW5 who marked the capsules 'A1' to 'A35' using a red marker pen;
 - C (d) PW5 put all the capsules into two plastic bags supplied by the hospital on which he marked 'AL(21)' and 'AL(35)';
 - (e) PW5 wrote the number of capsules, the date and time on the plastic bags (exhs. P8C(1)-(20) & P8D(1)-(15);
 - D (f) exh. P8C contained 20 capsules and exh. P8D contained 15 capsules;
 - (g) PW5 then prepared a search list which both he and the appellant signed;
 - (h) PW5 also lodged a police report (exh. P20);
 - (i) at about 11pm the appellant excreted a further four capsules;
 - E (j) photographs of the appellant holding the capsules were taken (exh. P11(19-20));
 - (k) the appellant then put the four capsules into a plastic bag;
 - (l) PW5 wrote 'A1-A4', the date and time and his signature on the plastic bag;
 - F (m) PW5 completed his duty at 12 midnight. He went back to his office and lodged a police report (exh. P21);
 - (n) he kept the exhibits in a locked steel cabinet in his office. He was the only one holding the key;
 - G (o) at 8am the next day PW5 handed over the exhibits and the search list to the I.O.; and
 - (p) both PW5 and the I.O. signed the borang serah menyerah. The I.O. received three plastic bags from PW5 and she marked them as 3, 4 and H 5 (exhs. P8C - P8E).
- I [8] The search list prepared by PW5 and the borang serah menyerah were not produced at the trial because according to the I.O., she had put them inside the investigation papers (I.P.) but the documents had gone missing. In cross-examination, PW11 denied the suggestion made by learned counsel that her evidence that she had received the search list and the borang serah menyerah prepared by PW5 is not true. PW11 had also denied that the exhibits kept in her locker could have been mixed up with other exhibits.

[9] The evidence of PW4 was as follows:

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- (a) at 9.45pm, the appellant excreted 12 capsules;
- (b) PW4 directed the appellant to clean the capsules and to put the capsules into a plastic bag supplied by the hospital;
- (c) PW4 marked the capsules as 'S1' to 'S12' (exh. P11(1-22));
- (d) on the plastic bag, PW4 wrote the number of capsules inside the bag, the date and time (exh. P8A);
- (e) PW4 then prepared a search list (exh. P14) and he and the appellant both signed exh. P14; and
- (f) PW4 then lodged a police report (exh. P15).

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[10] At 10pm, the appellant excreted a further ten capsules. The same procedure was repeated and the capsules were handed over to PW4. PW4 marked the capsules as 'S13' to 'S22'. The capsules were then put into a plastic bag (exh. P8B). PW4 also prepared a search list (exh. P17) and lodged a police report (exh. P18). PW4 ended his sentry duty at 12 midnight.

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[11] On 16 January 2012 at about 8am, PW4 handed over the exhibits to the I.O. (exh. P16). Prior to the handing over, PW4 kept the exhibits inside a locked steel cabinet in his office. He was the only person with the key to the cabinet. Both PW4 and the I.O. signed the borang serah menyerah (exh. P19).

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[12] On 17 January 2012 another x-ray (exh. P26) was taken by Nor Laily binti Mohd Nor (PW8). Dr Fazilah bt Mustapha (PW9) who was then a radiologist at the hospital had made comparisons between the x-ray of the appellant's abdomen that was taken on 15 January 2012 and the x-ray taken on 17 January 2012. According to PW9, the x-ray taken on 15 January 2012 showed the presence of foreign objects in the appellant's bowel. The x-ray taken on 17 January 2012 showed no foreign objects.

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[13] The I.O. testified that she had put all the exhibits into a brown envelope on which she had written 'HZ' and the report number (exh. P7). She then sealed the envelope and kept it inside a locked locker in her office. On 1 February 2012 the I.O. took the exhibits to the chemist for analysis (exh. P6). The chemist, Dr Vanitha a/p Kunalan (PW1) testified that she had received from the I.O. an envelope marked 'HZ' sealed with the seal of the Royal Malaysian Police. Inside the envelope were five plastic packets with the words 'Hospital Serdang' written on them (exhs. P8A - P8E). PW1 found the five plastic packets contained a total of 61 capsules. PW1 acknowledged receipt (exh. P5). Her analysis of the white crystal substance in the capsules revealed that this crystal substance contained 485.4g of methamphetamine. PW1 prepared her report (exh. P10). On 11 May 2012 the exhibits together

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- A with the report were handed to the I.O. The I.O. then kept the exhibits in the locked locker in her office and on 7 June 2012 she sent the exhibits to the store at the Sepang Police District Headquarters for safekeeping until the trial.

Findings Of The Trial Judge

- B [14] At the end of the prosecution's case the trial judge found no break in the chain of evidence such as to raise a doubt as to the identity of the exhibits and the number of capsules recovered. The learned judge found that both PW4 and PW5 had marked the capsules recovered from the appellant. Both
- C had also prepared the search lists, lodged police reports and prepared the borang serah menyerah to hand over the exhibits to the I.O. The trial judge accepted the explanation given by the I.O. as to why she could not locate the search lists and the borang serah menyerah. On the evidence adduced by the prosecution, the trial judge found that the prosecution had proved that the
- D appellant had custody, control and *mens rea* possession of the drugs and trafficking as defined under s. 2 of the Act had also been proven. Therefore the trial judge found that the prosecution has proved a *prima facie* case against the appellant and he was ordered to enter his defence.

The Defence Case

- E [15] The appellant, the eldest of four siblings, came to Malaysia in January 2011 to study English at a local college. His father was a butcher and his mother owns a cosmetic shop. His expenses in Malaysia were borne by his father. In November 2011, his father passed away. In mid December, he returned to Nigeria to attend his father's funeral. According to him, he could
- F not return to Nigeria earlier because he had no money since his father had died. Then his classmate, a fellow Nigerian by the name of Amiga, who he had known for approximately six months, borrowed RM5,000 from his brother Eliza, to lend to the appellant. Eliza was in the business of dealing in motor spare parts. The appellant went back to Nigeria. In Nigeria, he met
- G Amiga, who had also returned home.

- H [16] In January 2012, the appellant wanted to return to Malaysia. He wanted to leave through Lagos airport, which is an eight hour journey from his house. But he found that the airport was closed due to some crisis. He informed his mother that he had to travel the same day as his visa was about to expire. His mother then bought a ticket for him to leave from Cotonou in the Republic of Benin. The ticket was sent through a relative who stays in Lagos. Then he received a call from Amiga who also wanted to return to Malaysia. Both of them travelled together by bus to Cotonou.

- I [17] In Cotonou, the appellant and Amiga stayed in a hotel paid for by Amiga. Later three men came to their room. These men who were acquainted with Amiga then conversed with Amiga in a language which the appellant said he could not understand. Then one of the men took out some

capsules from a bag and asked Amiga to swallow them, which Amiga did. The appellant stated that he was then asked to swallow some capsules too. He was told that the capsules contained diamonds. When he refused, he was slashed on the back. He said he had three wounds on his back. One of the men had also pointed a gun to his head and had threatened to shoot him if he refused to swallow the capsules. Amiga just watched and did not help him. The appellant said that he was frightened and swallowed a total of 61 capsules. He knew the number of capsules he had swallowed because he said the men had counted loudly. Both he and Amiga then took a taxi to the airport followed by the three men in another car. While in the taxi, he did not ask Amiga who the three men were. At the airport he did not see them anymore. The appellant said he was not told what he was supposed to do with the diamonds.

[18] The appellant and Amiga then took a flight to Malaysia. They were on transit in Morocco and Dubai before arriving at KLIA on 15 January 2012. At KLIA, he was walking with Amiga after having cleared immigration when he was stopped by five men. He was told that the men were police officers and they told him to follow them to an office at the airport. An Indian man who the appellant referred to as 'Kenneth' took him to the office. He did not know where Amiga was. The appellant said that he told the Indian man that he came together with Amiga and the Indian man went to look for Amiga but could not find him. He had given Amiga's name and address to the policeman. However he did not tell the police about what had happened.

[19] According to the appellant, when the body search was conducted on him he had told the police officers that he had wounds on his back. When his stomach was pressed, he told them that he had diamonds in his stomach. At the hospital he did not tell the doctors about the wounds because the doctors were focussing on his stomach and also because of the language barrier.

[20] The appellant denied that he had returned to Nigeria to take the drugs to bring back to Malaysia or that Amiga is a fictitious person. He denied that he had willingly swallowed the drugs in order to traffic the drugs to Malaysia. He denied that he knew the contents of the capsules.

Findings By The Trial Judge

[21] At the end of the defence case, two issues were raised before the trial judge:

- (a) break in chain of evidence; and
- (b) failure by the prosecution to produce the flight manifest.

[22] The learned trial judge found that exhs. P14, P15, P17, P18, P20, P21, P10 and P6 all show that a total of 61 capsules were recovered. This fact was also confirmed by PW4, PW5, PW11 and PW1, the chemist. On the issue

- A of the flight manifests, the trial judge accepted the explanation given by the I.O. that she had not requested for the flight manifest earlier because this is a case of direct possession where the drugs were found inside the appellant's stomach. Having considered the defence, the trial judge found that the defence is an afterthought and Amiga is a fictitious character. In the upshot,
- B the trial judge found that the prosecution has proved its case beyond reasonable doubt. The appellant was found guilty and convicted and was sentenced to death.

The Appeal

- C [23] Before us learned counsel raised three issues as follows:
- (a) failure by the prosecution to produce the search list and the borang serah menyerah that was prepared by PW5 and handed over to PW11;
 - (b) discrepancies in the gross weight of the drugs as stated in the initial charge sheet and the weight and the gross weight obtained by the
- D chemist; and
- (c) discrepancies in the number of capsules retrieved by PW4 and PW5 and handed over to PW11 and the number of capsules received by PW1 for analysis.
- E [24] The gist of the submissions made by learned counsel in respect of the issues raised is that there had been a break in the chain of evidence which had raised a doubt as to the identity of the exhibits recovered from the appellant and tendered in court.
- F [25] We wish to address issues (a) and (c) first. Learned counsel submitted that the search lists and the borang serah menyerah that were prepared by PW5 would have shown the number of capsules that were recovered by PW5 from the appellant. However in our view, these documents though relevant, would have been in the nature of corroborative evidence on the number of capsules that PW5 said had been excreted by the appellant and their absence
- G is not fatal to the prosecution because we find ample evidence to support the testimony of PW5 and also PW4 on the number of capsules they had recovered.
- H [26] According to PW5, on the first occasion, 35 capsules were recovered followed by another four capsules later on. So the total number of capsules recovered by PW5 was 39. There are the unchallenged photographs (exh. P11(7), (15) and (16)), the markings 'A1' to 'A35' and 'A1' to 'A4' that were made by PW5 on the capsules themselves and the date, time and the number of capsules that he had written on the plastic bags. There are the police reports (exh. P20 and P21) in which PW5 had stated the number of capsules that he had recovered during his watch. These reports were lodged
- I before he had handed over the exhibits to PW11 and before the loss of the documents was discovered by PW11. This fact debunks the suggestion made by learned counsel to PW5 that his police reports were manufactured to

cover the loss of the documents. Then PW11 on her part had also marked '3', '4' and '5' on the plastic bags. She had also written 'HZ' on the envelope and sealed it with the seal of the Royal Malaysian Police. The envelope was later handed over by PW11 to PW1. PW1 in her evidence confirmed the markings made by PW5 and PW11. PW1 also stated that the plastic bags bore the words 'Hospital Serdang' which supports the evidence of the sentries that the plastic bags were supplied by the hospital.

[27] With regard to the number of capsules recovered by PW4 and PW5, PW4 stated that he had recovered a total of 22 capsules excreted by the appellant. Together with the 39 capsules recovered by PW5, the appellant had excreted a total of 61 capsules. This was confirmed by PW1 who stated that she had received 61 capsules for analysis. All the drug exhibits were produced and identified by the relevant witnesses. On the evidence, we find that the trial judge has not erred in finding that there is no doubt that the drug exhibits seized by both PW4 and PW5 and handed over to PW11 and later examined by PW1 were the same drug exhibits produced before the court. We find that the drug exhibits had been properly handled and there is no break in the chain of evidence regarding the handling of the exhibits that could have created a reasonable doubt as to the identity of the drug exhibits. Thus we find no merit in issues (a) and (c). Subsequently in his defence, the appellant confirmed that he had swallowed 61 capsules.

[28] With regard to the discrepancies in the gross weight of the drugs as stated in the initial charge sheet and the weight and the gross weight obtained by the chemist, we refer to *Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 wherein the Federal Court said amongst others that the weighing done by the chemist is the determining factor in the weight of the drugs and forms the basis of the charge, rather than the weighing process by the police since it is common knowledge that the weighing process undertaken by the police after the seizure of the drugs is only for classification purposes in the determination of the charge that will most likely to be preferred against the accused and/or arrested person. More often than not the disparity in weight of the drugs recorded is inevitable due to different weighing methods preferred and the different weighing apparatus used by the police force and the chemist department. Hence we find no merit in this issue.

[29] The appellant had admitted that he had swallowed the 61 capsules. Therefore he was in actual possession of the drugs. However, it was his contention that he was told that the capsules contained diamonds. It was also his contention that he swallowed the capsules out of fear because he was threatened by the three men who were Amiga's friends. In fact according to him, he had injuries on his back because he was hurt with a knife. It is also his evidence that he was not told what he was supposed to do with these capsules after he arrived in Malaysia.

A [30] Having considered the defence, we agree with the trial judge that the character 'Amiga' is fictitious. Inspector Gan (PW10) was the officer who stopped the appellant at the airport and who conducted a search on the appellant. That was the first available and best opportunity for the appellant to mention Amiga. Yet according to PW10, and we have no reason to doubt his testimony, the appellant did not mention anything about Amiga or his injuries to PW10. Neither was PW10 cross-examined whether he had found any injuries on the appellant when he conducted a body search on the appellant. PW10 said that the appellant was calm during the search. We have considered his demeanour and we are of the view that his calm demeanour can probably be attributed to the fact that he had the drugs concealed inside his body and not on his person or in his luggage. Thus there was no reason for him to be apprehensive about a body search.

D [31] With regard to the appellant's evidence that the capsules contained diamonds, we find that if it is true that he was carrying diamonds, it is inconceivable that he was not told what he was supposed to do with them once he is in Malaysia. The appellant's evidence shows that these purported diamonds do not belong to him. Therefore we find it implausible that the people who had purportedly forced him to swallow the precious diamonds would have allowed him to carry them all the way from Africa to Malaysia without telling him precisely what he has to do with the diamonds. Having considered the appellant's evidence, we agree with the trial judge that the defence is an afterthought. We are of the view that the manner in which the drugs were concealed and the method employed to carry the drugs to Malaysia show that the appellant knew what he was carrying.

F **Conclusion**

G [32] We find that the prosecution has proved its case beyond reasonable doubt that the appellant was trafficking in dangerous drugs and the defence has failed to raise any reasonable doubt in the prosecution's case. For the reasons stated, we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

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